IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 653 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

VAHAB MOHMEDBHAI SEPAI

Appearance:
MR DP JOSHI,A.P.P. for the State
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI
Date of decision: 15/04/99

ORAL JUDGEMENT

(Per : Panchal, J.)

The acquittal of the respondent of the offence punishable under section 302 of the Indian Penal Code

recorded by the learned Additional Sessions Judge, Bhavnagar vide judgment and order dated April 9, 1992, in Sessions Case No. 56/90, is subject matter of challenge in the present appeal,which is filed by the State of Gujarat under section 378 of the Code of Criminal Procedure, 1973.

2. According to the prosecution, the respondent was lodged in Sub Jail, Palitana on January 3,1990 in connection with C.R.No. I. 1/90 registered with Gariyadhar Police Station; whereas deceased Dhirubhai Gabharubhai was also lodged in the said Sub-Jail as an under-trial prisoner in connection with Criminal Case No. 144/87 and the respondent on January 3, 1990 between 6.00 to 6.30 P.M. with an intention to kill deceased Dhirubhai Gabharubhai caused injuries to him with pickaxe and after throwing blanket as well as carpet on him, set him ablaze and thus, caused his death. The prosecution has alleged that Keshavji Meghji, who was warden of the Sub-Jail at the relevant time, had gone to bring tiffins for the under-trial prisoners and when he returned to Sub-Jail, he noticed that the deceased was lying on the ground and blanket was burning. According to the prosecution, on inquiry being made by the Warden, the respondent confessed that he had killed the deceased, as the deceased had refused to part with match box which the respondent wanted to light a bidi. The prosecution has claimed that thereafter necessary report was made by the warden to the jailor, who visited the Sub-Jail and after returning to his Office, the jailor lodged F.I.R. with the police. On complaint being filed, it was investigated by Mr.Ravindra Dhanjibhai Mitra, who was Senior Police Sub Inspector of Palitana town. The investigating officer recorded statements of witnesses who were found to be conversant with the facts of the case and sent dead body for autopsy. The autopsy on dead body was performed by Dr. Babulal Becharbhai Aghara. Incriminating articles seized during investigation were sent to Forensic Science Laboratory for analysis. At the conclusion of investigation, the respondent was chargesheeted for the offence punishable under section 302 of the Indian Penal Code. As the said offence is exclusively triable by Court of Sessions, case was committed to Sessions Court, Bhavnagar, where it was numbered as Sessions Case No. 56/90. The learned Additional Sessions Judge, Bhavnagar to whom the case was made over for trial, framed charge against the respondent at Exh.3 for the offence punishable under section 302 of the Indian Penal Code. The charge was read over and explained to the respondent, who pleaded not guilty to the charge and claimed to be tried. The prosecution,

therefore, examined; (1) Bhurjibhai Shakaraji Baranda, PW 1, Exh.13, (2) Keshavji Meghji, PW 2, Exh.21, (3) Dr. Babulal Becharbhai Aghara, PW.3, Exh.25, (4) Baghabhai Keshavbhai, PW 4 Exh.27, (5) Shantishanker Bhaishanker, PW 5, Exh.28, (6) Bharatkumar Chandulal Modi, PW 6, Exh.29, (7) Bachubhai Kanjibhai, PW.7, Exh.32, (8) Amrutbhai Tidavala, PW.8, Exh.36, and (9) Ravindra Dhanjibhai Mitra, PW 9, Exh.37 to prove its case against the respondent. The prosecution also produced documentary evidenced, such as, inquest panchnama at Exh.7, letter dated 3.1.1990 addressed by Keshavji Meghji to the jailor at Exh.14, First Information Report lodged by jailor at Exh.15, necessary entries from jail register at Exhs. 16, 18, 20 & 22, postmortem reports of the deceased at Exh.26 etc., in support of its case against the respondent. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the respondent generally on the case and recorded his statement under section 313 of the Code of Criminal Procedure, 1973. In his statement, the respondent denied the case of prosecution, but he did not lead any evidence in his defence. On appreciation of evidence, the learned Judge observed that no direct evidence was led by the prosecution to establish guilt of the respondent and the case solely rested on circumstantial evidence. The learned Judge held that as warden Keshavji Meghji could not reproduce the so-called confession verbatim as made by the respondent, it was not reliable piece of evidence. The learned Judge deduced that the respondent himself had a bundle of bidies as well as match box and, therefore, it was not probable that he would kill the respondent only because the respondent did not give him match box. The learned Judge noted that the map of place of incident was not produced by the prosecution and the record indicated that earlier prisoner Pancha Popat had jumped the wall of the Sub-Jail and escaped and, therefore, possibility of a person having entered the Sub-Jail by jumping the wall and leaving the Sub-Jail after killing Dhirubhai Gabharubhai was not ruled out. The learned Judge noticed that before the incident, the respondent was not knowing the deceased and had no enmity worth the name with the deceased, as a result of which motive was not proved and benefit of this circumstance should go to the respondent. In the ultimate decision, the learned Judge by the impugned judgment acquitted the respondent by holding that the cumulative effect of the circumstances was not such as to negative the innocence of the respondent and to bring the offence home to prove his guilt beyond reasonable doubt, giving rise to present appeal.

4. The learned Counsel for the State Government submitted that in view of the extra-judicial confession made by the respondent before witness Keshavji Meghji, the respondent ought to have been convicted of the offence with which he was charged. It was claimed that the respondent was all alone in the company of the deceased and as he was last seen together with the deceased, it ought to have been held that the circumstantial evidence was sufficient to connect the respondent with the offence of murder of the deceased. The learned Counsel pleaded that the circumstantial evidence against the respondent was not only conclusive, but independent to prove the charge for the offence of murder and, therefore, the appeal should be accepted.

5. In our view, there is no substance in any of the contentions urged on behalf of the appellant and the appeal cannot be accepted. We may state that the learned Counsel for the appellant has taken us through the entire evidence on record and we have carefully perused the same. It is not the case of the prosecution that there was any eye witness to the incident involving the respondent in the offence of murder of the deceased. Therefore, the learned Judge rightly observed that case against the respondent was circumstantial in nature. It is well settled that in cases where evidence is of a circumstantial nature, the circumstances from which conclusion of guilt is to be drawn should in first instance be fully established and all the facts so established should be consistent only with the hypothesis of guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis, but the one proposed to be proved. An accused can be convicted on circumstantial evidence only if every other reasonable hypothesis of guilt is completely excluded and the circumstances are wholly inconsistent with the innocence of the accused. Bearing in mind the above-referred to well settled principles, we will now proceed to consider the question whether the circumstances from which the conclusion of guilt is sought to be drawn, in the first instance, are fully established or not. It is the prosecution case that the respondent was all alone with the respondent in Sub-Jail and had, therefore, opportunity of committing the crime in question. The evidence of witness Bhurjibhai Shakaraji Baranda indicates that he was discharging duties as Clerk-cumJailor in the Office of Mamlatdar and one prisoner named Rajendrasinh Kiritsinh was brought before him on January 3, 1990 from Bhavnagar Central Jail. His

evidence further indicates that after making necessary entries, the said prisoner was sent to Sub-Jail, Palitana to enable him to have lunch and therefrom, he was produced before Court directly from Sub-Jail. According to Mr. Baranda, said prisoner was thereafter taken to Sub-Jail from-where he was brought to his Office at about 2.00 P.M. and after preparation of travel warrant, he was sent to Bhavnagar. This witness has produced relevant registers, but entries in register do not support evidence of this witness regarding arrival and departure of prisoner Rajendrasinh Kiritsinh from the sub-jail. The fact that prisoner Rajedrasinh Kiritsinh had gone to Palitana Sub-Jail from-where he was taken to Court and had again returned to Palitana Sub-Jail, is not in dispute. As the prosecution has failed to prove that prisoner Rajendrasinh Kiritsinh had left Office of Mr. Baranda at about 2.00 P.M. for Bhavnagar, we are of the opinion that the circumstance that the respondent was all alone with the deceased at the time when the incident took place,is not established at all. The evidnce on record establishes that earlier prisoner Pancha Popat had escaped from sub-jail by jumping wall of the prison, which would indicate that it is possible for any one to come into sub-jail and leave the same after committing crime and, therefore, in absence of map of place of incident, it would not be correct to conclude that only the respondent had opportunity of committing the crime in question. Moreover, the incident took place in the month of January and, therefore, there was darkness by the time the incident had taken place. Back portion of sub-jail is not being guarded and there are no residential houses on the back portion of sub-jail. Therefore, possibility of someone having entered sub-jail by jumping back wall and leaving the jail after committing crime is always there. Again, so-called extra-judicial confession is not proved by the prosecution as required by law. The another incriminating circumstance sought to be proved is so called extra-judicial confession made by the accused. Extra judicial confession to afford a piece of reliable evidence must pass the test of reproduction of exact words, the reason or motive for confession and person selected in whom confidence is reposed. In our view, the confession alleged to have been made by the respondent is not the same as stated by witness Keshavji Meghji in his evidence before the Court and as mentioned by him in his letter which was addressed to the jailor. In the letter to the jailor, witness Keshavji Meghji stated that it was confessed by the respondent that he had killed the deceased, as quarrel as well as scuffle had taken place between him and the deceased when the deceased refused to give match box to him. However, this witness Keshavji

Meghji has not referred to quarrel or scuffle in his substantive evidence at all while mentioning about the so-called confession made by the respondent. If scuffle as mentioned by the witness in his letter to jailor had taken place, at least minor abrasions would have been noticed on the person of the respondent and/or some violent marks would have been found on the clothes put on by the respondent. The arrest panchnama of the respondente does not indicate that the respondent had suffered any injury of that his clothes were torn at all. Under the circumstances, the so-called extra-judicial confession sought to be relied upon by the prosecution does not inspire confidence of the Court. Moreover, witness Keshavji claimed in his evidence that when he saw the deceased lying on the ground, he had raised shouts, as a result of which Head Constable Nazabhai, police constables Ghanshyamsinh, Ranjitsinh and Badhabhai who were present had also come. It is relevant to note that out of the above referred to four police officials, only Baghabhai is examined, who does not refer to the so-called extra-judicial confession made by the respondent before witness Keshavji at all. On the facts and in the circumstances of the case, we are of the opinion that so-called extra judicial confession made by the respondent is not proved and the learned Judge was justified in not placing reliance upon the so-called extra-judicial confession, which is even otherwise also a weak piece of evidence and not corroborated by any other independent evidence on record. It is relevant to note that at about 6.30 P.M. warden Keshavji Meghji had noticed that the deceased was lying on ground, but F.I.R. was filed only at about 9.15 P.M. and late filing of F.I.R. is neither explained by Mr. Baranda, who is complainant or by Keshavji Meghji who was warden. Making of report by one authority to another authority can never be construed as explaining delay in filing F.I.R. and the prosecution has not given explanation as to why the complaint was filed late, though the Office of D.S.P. was situated quite nearby the Sub-Jail. Though it is not necessary for the prosecution to prove motive in all cases of circumstantial evidence, but in the facts of the present case, motive becomes very relevant because it is nobody's case that the respondent was knowing the deceased and as admitted by witness Mr. Baranda, the respondent had no enmity with the deceased. When the respondent himself had a bundle of bidies and match box, it is not probable that he would ask for match box from the deceased and on refusal by the deceased to give match box, would kill him. Thus, the prosecution has failed to prove one of the relevant circumstances to connect the respondent with the crime in question. It is important

to notice that pickaxe is not an instrument which can be used by throwing it at some one from a distance and when a person wants to kill another person with the help of pickaxe, he has to be near the person who is to be assaulted. The postmortem notes show that the deceased had sustained several serious injuries and, therefore, if the respondent had assaulted the deceased after going near to him, naturally his clothes would have been blood stained, but admittedly in this case, clothes of the respondent were not blood stained at all. On the totality of the facts and circumstances of the case, we are of the opinion that chain of circumstances sought to be established against the respondent is not complete and the circumstances established do not prove the guilt of the respondent beyond reasonable doubt, nor does exclude the possibility of innocence of the respondent. Under the circumstances, the appeal cannot be accepted and is liable to be dismissed.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal articles to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

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